IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,516

WILLIAM A. PORTER, *Appellant*

vs.

W. FRANCIS WILSON AND PAULINE WILSON,
Husband and Wife, and
RICHARD A. WILSON AND SHARON L. WILSON,
Husband and Wife, *Appellees*

Appellant's Reply Brief

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Appellant's Reply Brief

Now comes William A. Porter, Appellant and files his Reply to the Brief of Appellees herein and would show the Court as follows:

REPLY TO APPELLEES' STATEMENT OF THE CASE

In Appellant's Statement of the case, Appellant attempted to set forth the nature of the litigation before this Court.

Appellees' Statement of the Case requires a short reply by Appellant.

(A) THE CLERK'S ENTRY IS NOT SUFFICIENT TO SHOW THE LANGUAGE AND EFFECT OF A STIPULATION.

The alleged stipulation between the parties alluded to in Appellees' Brief to the effect that the decision in

Porter v. Porter, 101 Ariz. 131, 416 P.2d 564 would control the outcome of this case (Appellees' Brief, p. 1) is not included in this record on appeal. Appellees did not designate said stipulation and order to be included in the appellate record in this case. Therefore, Appellees cannot now, by referring to the clerk's docket entry (Tr. 103) correct this omission. It would appear unlikely that all parties would *carte blanch* agree to be bound by an appeal then pending in another court. The customary procedure is to stay proceedings until after the other appeal or case is terminated, then proceed with the case before the Court. If Appellees proposed to present the stipulation to this Court, Appellees should have designated it in order for the Court to have it before it at this time.

POINT OF ERROR I

The Trial Court erred in failing to grant Appellant's Motion for a Continuance

Appellees contend that Appellant's argument pertaining to Appellant's Motion for Continuance of the hearing is "pure fabrication" (Brief, p. 4).

The record shows by certificate of service that Appellant's counsel mailed the Motion for Continuance to all parties on June 9, 1967, which was a Friday. (Tr. 83). Appellees make much of the fact that the clerk's file mark shows that it was not received until Tuesday, June 13, 1967. (Tr. 83). Appellant's counsel did not know when the Motion was filed by the Clerk for the reason that counsel reported to the sunny hills of Fort Chaffee, Arkansas, on June 10, 1967. The

order of dismissal with prejudice was not signed until June 14, 1967, and the matter was called to the Court's attention by the Motion for New Trial citing, *inter alia*, the denial of the Motion for Continuance as grounds for said Motion. (Tr. 89).

Mr. Paul Beer represented the sisters of Appellant at said hearing but Appellant was not represented at said hearing. The order of dismissal prepared by Appellees as shown (Tr. 87) was not submitted for approval by other counsel pursuant to the local rules of the Federal District Court for Arizona and the error of Mr. Beer's representation was compounded. As shown by the Complaint in this case, Appellant was represented by Hawkins & Miller of Coeur D'Alene, Idaho (Tr. 2 & 3) while Paul Beer represented Pearline Porter and Pauline P. Leonard. The old firm of Beer, Seaman & Polley was dissolved with Mr. Beer continuing to represent the sisters and Wes Polley, now practicing in Bisbee, Arizona, and Sterling W. Steves representing Mr. Porter. Appellant's lead counsel changed with the withdrawal of Hawkins & Miller and the appearance of Mr. Steves as lead counsel for Appellant on June 9, 1967. This was fully discussed in our main brief (p. 7-8). The Motion for Continuance should have been granted.

POINT OF ERROR II

The Trial Court erred in failing to resolve a conflict between court decisions in different states by applying the Constitutional Principles of "Full Faith and Credit."

POINT OF ERROR III

The Trial Court erred in holding that the Idaho judgment is not entitled to Full Faith and Credit and is res judicata as to each and every ground, jurisdictional and otherwise.

(A) APPELLANT DID NOT WAIVE OR ABANDON HIS CLAIM UNDER THE IDAHO DECREE

Appellees have taken the position that because Appellant did not urge his Motion for Summary Judgment prior to the time that Appellees' Motion to Dismiss was granted that Appellant waived and abandoned his claim under the Idaho decree. Appellees' argument is specious as will be quickly demonstrated.

The order entered by the lower court was to grant Appellees' Motion which had been filed for summary judgment or in the alternate, to dismiss. The order entered dismissed the case with prejudice because there was no issue for the Court to try. (Tr. 87).

It is Appellant's contention that the Idaho decree was entitled to "Full Faith and Credit" and the Arizona judgment asserted as a bar by Appellees failed to follow Article IV, Section 1 of the United States Constitution.

In a word, Appellees' Motion to Dismiss traversed the Complaint and all matters filed by all parties, affidavits, exhibits, etc., were before the Court. Appellees' Motion should have been denied. Appellant does not urge that his Motion for Summary Judgment should have been granted but only that Appellees' Motion should have been denied. Certainly, Appellant did not waive the Complaint based on the Idaho decree. Appellees' argument is a non sequitur.

(B) THIS APPEAL IS NOT MOOT

Appellees assert this appeal is now moot for the reasons that after entry of judgment and prior to the transmission of the record to the Clerk of this Court, Appellees advised that they could not stipulate as to the record on appeal for the reasons that they had conveyed their interest and title in the Arizona Hotel property to the City of Phoenix, Arizona. (Tr. 99). If Appellant is successful on this appeal and this case is rendered as prayed for, with the upholding of the Idaho decree, Appellees will have conveyed a nullity to the City of Phoenix and Appellant's title will be good and those who hold from Appellees will only stand in Appellees' shoes in the chain of title.

(C) APPELLANT AS A CO-OWNER OF THE ARIZONA HOTEL PROPERTY IS A PROPER PARTY TO THIS APPEAL

Appellees assert that because the Complaint was filed by Appellant and his twin sisters doing business as the Continental Hotels Systems, a co-partnership,

that Appellant is not a proper party to this appeal from the order of dismissal. (Brief, p. 2). Appellees' position is that under Sect. 29-225, A.R.S. 1956, Appellant has no individual right in this property. In Appellees' Answer filed in the district court, Appellees denied the existence of the partnership: "Defendants deny that Plaintiffs are a copartnership d/b/a Continental Hotels System." (Tr. 2). Appellees apparently have changed their position on this issue.

Appellant claims as a co-owner of the fee title. The nature of Appellant's title to the Arizona Hotel stems from the deed given to him by Gladys Porter of Gladys' community interest in the Arizona Hotel, pursuant to the Idaho decree. (Tr. 72, XVI of Amended Facts & Conclusions of Law). Appellant's twin sisters' title stemmed from both Mrs. Gladys Porter and Appellant (Tr. 72, XV of Amended Facts and Conclusions of Law). Thus, individual deeds to the twin sisters from Gladys Porter and Appellant were provided for in the Idaho decree and a separate deed to Appellant from Gladys Porter. The sisters and Appellant are co-owners of the partnership property under Appellant's theory.

In this case, the partnership per se did not file suit but the three co-owners filed suit doing business as the Continental Hotels System. Under Arizona law, a partnership is an "association" of two or more persons to carry on as co-owners a business for profit. Sect. 29-206, A.R.S. 1956. In this case, the co-owners have all sued the Appellees to quiet title. Appellees suggest that only the legal entity has title and not the partners

under Sect. 29-225, A.R.S. 1956. No authority is cited for Appellees' proposition.

In Arizona and elsewhere, a general partnership such as this is like a joint venture except joint ventures are only for one occasion and a partnership for more than one. The partnership is not a legal entity as such but is an "association" by statute. Appellees would have this court impose a strict rule found in other jurisdictions where *limited* partnerships are found and are held to be entities such as in New York under the Partnership Law, Sect. 90 et seq. *Alley v. Clark*, 71 F.Supp 521.

Arizona has a limited partnership law, Sect. 29-301 et seq. A.R.S. 1956, but the partnership here was not of that type and even if it were it would be a strained construction to impose on an action to quiet title to say one co-owner partner, who has a direct, immediate, pecuniary, substantial interest in the suit does not have an appealable interest in a case where he may be deprived of a 2/3's interest in the title to real property. The order of dismissal deprives him of his interest and he has status and standing to seek review of the order.

In *Donroy, Ltd. v. U.S.*, (Ca 9th, 1962) 301 F.2d 200, 206, a question under the California limited partnership statute arose as to the extent of the interest of the individual partners in the limited partnership and it was held that the partners were "but an association of individuals" and that under "this concept of partnership as an association of individuals, it follows that each partner, whether general or limited

has *an interest* as such in the assets . . ." In the case at bar, a general partnership, with only general partners each owning interests in the property have an interest in the real property as a co-owner. In Arizona, Sect. 29-224(1) A.R.S. 1956 provides that The Extent of Property Rights of a Partner are: "His rights in specific partnership property." Here, Appellant seeks by this review to protect *his* interest in partnership property. Appellant has several different rights to the partnership property:

(1) the right as a co-owner to specific property such as the Arizona Hotel involved here, and

(2) his interest in the partnership as such, and

(3) the right to participate in its management. *Stilgenbaur v. U.S.*, (Ca 9th, 1940) 115 F.2d 283. Appellant seeks to protect his right and title as a co-owner of the specific real property.

(D) APPELLEES' ARGUMENT WITH REFERENCE TO THE PARTNERSHIP SUPPORTS APPELLANT

Appellees' argument that the partnership, Continental Hotels System was the Plaintiff below and not the Appellant and, therefore, Appellant has no personal property right to the partnership property supports Appellant's theory that *Porter v. Porter*, 101 Ariz. 131, 416 P.2d 564 was not res judicata to this claim.

Assuming Appellees' argument, the partnership per se was not a party to the prior Arizona action. In

order for a prior case to be a bar to the claim to quiet title, the test enunciated in *Hartford Accident and Indemnity Co. v. Jasper* (CA 9th, 1944), 144 F.2d 266, 267 must be met:

> "A matter cannot be res judicata unless there be *identity of the things sued for*, of *the cause of action*, of the *persons and parties*, the *quality of the persons for and against whom the claim is made*, and the judgment in the former action be so in point as to control the issue in the pending suit." (Emphasis supplied)

The quiet title is not a divorce action, or a suit for separate maintenance and involves the partnership which raises different issues than in *Porter v. Porter*. The Supreme Court of Arizona cited the fact that the partnership was not before the Idaho court as additional grounds for holding that not all parties were in Idaho:

> "Additional evidence that the Idaho court did not merely determine the rights of the parties before it is the fact that the partnership in which ownership of the hotel was found to be lodged was not a party before the court. Furthermore, the Uniform Partnership Act is in effect in Idaho so that a partnership can sue or be sued in its own name. Idaho Code, Sect. 53-301 et seq, Sect. 5-323. The Continental Hotels Systems partnership was not a party to the Idaho suit. Therefore, the Court was not merely adjudicating the rights of parties before it when it decided that the partnership owned the Arizona Hotel. That part of the Idaho judgment is void. *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct 242, 11 L.Ed 2d 186; *Fall v.*

Eastin, 215 U.S.1, 30 S.Ct 3, 54 L.Ed 65. Idaho has recognized this principle. Taylor v. Hulett, 15 Idaho 265, 97 P.37." [416 P.2d at 571]

Nor was the partnership a party in the Arizona action, an essential element of res judicata was missing in both the Idaho case and the Arizona case.

(E) FULL FAITH AND CREDIT UNDER THE UNITED STATES CONSTITUTION IS AN ISSUE IN THIS CASE

(1) DENIAL OF CERTIORARI BY THE SUPREME COURT OF THE UNITED STATES DOES NOT MEAN THAT COURT DETERMINED THE CASE

Appellees assert the theory that because the Supreme Court of the United States refused a writ of certiorari sought by Appellants' sisters subsequent to the rendition of the opinion of the Supreme Court of Arizona in *Porter v. Porter* that the refusal of the writ, in effect, means *Porter v. Porter* was "considered" and has been "determined" by the Supreme Court of the United States. This is a frequent and recurring misconception of the effect of denial of certiorari.

The denial of a writ of certiorari does not mean that the case was "considered" or "determined" by the Supreme Court of the United States. As pointed out by Mr. Justice Frankfurter in *Sheppard v. State of Ohio* (1956), 352 U.S. 910, 77 S.Ct 118, 1 L.Ed 2d

119, denial of certiorari:

> ". . . means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision. For reasons that have often been explained the Court does not give the grounds for denying the petitions for certiorari in the normally more than 1,000 cases each year in which the petitions are denied. It has also been explained why not even the positions of the various Justices in such cases are matters of public record. The rare cases in which an individual position is noted leave unillumined the functioning of the certiorari system, and do not reveal the position of all the members of the Court. See State of Maryland v. Baltimore Radio Show, 338 U.S.912, 70 S.Ct 252 94 L.Ed 562."

(2) *ERIE V. THOMPKINS* DOES NOT APPLY TO THIS CASE FOR THE REASON THAT THIS CASE INVOLVES A CONFLICT OF DECISIONS OF SISTER STATES WHICH INVOKES THE FULL FAITH AND CREDIT CLAUSE

Appellees assert that the doctrine of *Erie v. Thompkins*, 304 U.S. 64 applies to this case and, therefore, no issue of full faith and credit is involved here for the reasons that the matters have been fully litigated and *Porter v. Porter* is res judicata as to this case.

The issue here is whether this Court is bound by the Arizona Supreme Court's opinion in *Porter v. Porter* if the Arizona Supreme Court failed to give

full faith and credit to the Idaho decree.

The Arizona Supreme Court gave four reasons for failure to give full faith and credit to the prior Idaho decree:

(1) Idaho was "obligated" to give full faith and credit to the Arizona separate maintenance judgment and the "later judgment" and because of such failure the Idaho judgment [was] fatally defective because it failed to give the prior valid Arizona judgment full faith and credit and, therefore, [was] not entitled to full faith and credit by this court. [416 P.2d at 568]

(2) The Idaho judgment was not entitled to full faith and credit because the Idaho court had no jurisdiction, power or authority in the divorce proceeding to enter an order distributing Gladys' separate property and not community property. [*ibid.*].

(3) A foreign judgment will not be given a greater effect than a domestic judgment on the same issue. Citing the rule of primary of the first final judgment is a necessary incident to full faith and credit, citing *Hanson v. Denckla*, 357 U.S. 235, 256 [416 P.2d at 569].

(4) Idaho did not have power or authority and was completely without jurisdiction to establish or quiet or otherwise directly affect title to the Arizona Hotel property [416 P.2d at 569-70].

The succinct, superb dissenting opinion of Justice Udall answers the majority of three and made short shrift of the majority's reasoning which appeared to

be nothing short of a retaliatory opinion by the Supreme Court of Arizona against Idaho for failure to give credit to the prior separate maintenance order and a sheriff's sale. Justice Udall's points were swift and incisive:

1. There was never a final judgment in Arizona prior to the Idaho judgment that determined ownership of the property on the merits; therefore, Idaho did not have to give full faith and credit to a prior Arizona judgment.

2. Even assuming a valid Arizona judgment, the Idaho judgment was subsequent in time and entitled to full faith and credit.

3. Gladys waived her rights in the Arizona property when she appeared in Idaho and by sequent acts of executing quitclaim deeds and releases to Appellant and to the Porter sisters.

4. The first final determination on the merits of any interest of the Porter sisters in the Arizona property was by the Idaho court where the Porter sisters had appeared as proper parties. [416 P.2d at 572-83].

The District Court in denial of Appellant's Motion for Rehearing was of the opinion that *Erie, supra*, applied and that the District Court was obligated to follow the conflicts of laws rules promulgated by the Supreme Court of Arizona citing *Klaxon v. Stentor Electric Mfg Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 198 (1941); (Tr. 91).

Both *Klaxon* and *Griffin* held that federal courts in

diversity cases are governed by the conflicts of laws of the courts where they sit.

We do not quarrel with those authorities but this case involves more than a simple diversity case. This case plainly involves the issue as to whether or not a prior decision by the Supreme Court of Idaho in *Porter v. Porter*, 84 Idaho 400, 373 Pac 2d 327 (1962) should be afforded full faith and credit under the federal constitution. In *Moore's Federal Practice*, Vol. 1A, page 3408 this comment and quote appears:

> "In United States v. Pink (1942) 315 U.S. 203, 62 S.Ct 552, 86 L.Ed 796, Chief Justice Stone, in as dissenting opinion in which Justice Roberts joined, made the following statement as to conflict of laws and full faith and credit, which seemingly is not at variance with the majority opinion:
>
> > 'In administering and distributing the property thus within their control, the New York courts are free to apply their own rules of law including their own doctrines of conflict of laws [citing the Tompkins case, Griffin v. McCoach, supra, and Kriger v. Wilson (1916) 242 U.S. 171, 176, 37 S.Ct 34, 35, 61 L.Ed 229], *except in so far as they are subject to the requirement of the full faith and credit clause—a clause applicable only to the judgments and public acts of states of the Union and not those of foreign states.*' " (Emphasis supplied)

Appellant's contention is that in this case the federal court in Arizona is bound to follow the conflict of laws promulgated by the Supreme Court of Arizona

except insofar as they are subject to the requirements of the full faith and credit clause of the federal Constitution.

In *Estin v. Estin*, 334 U.S. 541, 92 L.Ed 1078, 1 ALR 2d 1412, at 1417 the Supreme Court said:

> "The situations where a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy, have been few and far between. See Williams v. North Carolina, 317 US 287, 294, 295, 87 L.Ed 279, 283, 284, 63 S.Ct 207, 143 ALR 1273; Magnolia Petroleum Co. v. Hunt, 320 US 430, 438, 439, 88 L.Ed 149, 154, 155, 64 S.Ct 208, 150 ALR 413, 15 NCCANS 529, and cases cited; Sherrer v. Sherrer, 334 U.S.343 92 L.Ed (Adv 1055) 68 S.Ct 1087 1097, 1 ALR 2d 1358, supra. The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. Williams v. North Carolina, 317 U.S. 287, 301, 302, 87 L.Ed 279, 287, 288, 63 S.Ct 207, 147 ALR 1273; Sherrer v. Sherrer, 334 U.S. 343, 92 L.Ed (Adv 1055), 68 S.Ct 1087, 1097, 1 ALR 2d 1358, supra. It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."

Appellant has demonstrated in its main brief under Points of Error II and III the error made by the Supreme Court of Arizona in failing to apply the Constitution's command of full faith and credit. The district

court was in error in assuming it was bound by such a decree of the Arizona Supreme Court that flaunted and made a mockery of the full faith and credit clause, rendering any hostile judgment procured in a sister state susceptible to non-enforcement in Arizona. The Idaho judgment may have been hostile, it may have been repugnant to Arizona law, but it should have been enforced by the Arizona Supreme Court and the federal district court should have denied the Motion to Dismiss the complaint premised on the Idaho decree.

As stated in *Durlacher v. Durlacher*, 123 F.2d 70 (9th Cir 1941), cert denied 315 U.S. 805, 62 S.Ct 633, 86 L.Ed 1204:

> "The Supreme Court has repeatedly held that under the full faith and credit clause of the constitution (extended by the Statute to the Court below), a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the state requested to enforce it . . . (Citations)"

See also *Bassett v. Bassett*, 141 F.2d 954 (9th Cir. 1944), cert denied 323 U.S. 718, 89 L.Ed 577, 65 S.Ct 47 which followed and reiterated the *Durlacher* holding by this circuit.

CONCLUSION

The foregoing amply demonstrates that the federal court in Arizona is not required to follow the Arizona conflicts law promulgated by the Arizona court where the full faith and credit clause requires enforcement of the judgment of a sister state. Appellant prays that the judgment of dismissal be reversed.

Respectfully submitted,

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By:.....
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Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules. Dated at Fort Worth, Texas the ..... day of April, 1968.

STERLING W. STEVES

CERTIFICATE OF SERVICE

I certify that on the ..... day of April, 1968, I mailed three copies of Appellant's Reply Brief to the attorney for Appellees, the Honorable Richard A. Wilson, at his last known address which was at the offices of Lutich, D'Angelo & Wilson, 3120 North Third Avenue, Phoenix, Arizona, via certified mail.

STERLING W. STEVES